Petition

81-1306

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SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981

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CARROLL MATHERNE

V.

TERREBONNE PARISH POLICE JURY

* * * * * * *

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

* * * * * * *

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QUESTIONS PRESENTED

1.

Does taking property of Petitioner by the governmental actions of the Police Jury of the Parish of Terrebonne, a public body, without legal authority and without compensation, and the issuance of an injunction, shown by the record to be without evidence to support the factual basis thereof, constitute denial of property rights without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2 and 4 of the Constitution of Louisiana?

2.

Is it a denial of due process of law, contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States, for the Supreme Court of Louisiana to deny Petitioner's Application for Rehearing on October 9, 1981, after having previously issued an order on September 30, 1981 granting time through November 2, 1981 for Petitioner to file a supplemental brief in support of his application for rehearing, the supplemental brief not having been filed until October 30, 1981?

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SUPREME COURT
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CARROLL MATHERNE

Petitioner

V.

TERREBONNE PARISH POLICE JURY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

★ ★ ★ ★ ★ ★ ★

Petitioner, Carrol J. Matherne, prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Louisiana entered in the above case on September 8, 1981 and the denial by said court of Application for Rehearing on October 9, 1981 and the further denial on November 16, 1981 of Motion and Order.

QUESTIONS PRESENTED

1.

Does taking the property of petitioner by the governmental actions of the Police Jury of the Parish of Terrebonne, a public body, without legal authority and without compensation, and the issuance of an injunction, shown by the record to be without evidence to support the factual basis thereof, constitute denial of property rights without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2 and 4 of the Constitution of Louisiana?

2.

Is it a denial of due process of law, contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States, for the Supreme Court of Louisiana to deny Petitioner's Application for Rehearing on October 9, 1981, after having previously issued an order on September 30, 1981 granting time through November 2, 1981 for Petitioner to file a supplemental brief in support of his application for rehearing, the supplemental brief not having been filed until October 30, 1981?

REFERENCE TO OPINIONS BELOW

Petitioner is aggrieved by the judgment of the Supreme Court of Louisiana and, for this petition, refers to the following:

(a) The judgment of the Supreme Court of Louisiana in the matter entitled Terrebonne Parish Police Jury v. Carroll Matherne, reported at 405 So. 2d 314, rendered September 8, 1981.

(b) Petitioner's Application for Rehearing dated September 17, 1981.

(c) Order of the Supreme Court of Louisiana dated September 30, 1981, granting petitioner an extension of time up to and through November 2, 1981 to file a supplemental brief in support of Application for Rehearing.

(d) The news release of October 12, 1981 from the Clerk of the Supreme Court of Louisiana reading, in part, as follows:

"On the 9th day of October, 1981, the following action was taken by the Supreme Court of Louisiana, composed of

Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Corsier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

★ ★ ★

81-C-0531 Terrebonne Parish Police Jury v. Carroll Matherne. Dixon, C.J., would grant a rehearing . . ."

(e) The Notice of Judgment dated October 21, 1981, issued by the Clerk of the Thirty-second Judicial District Court, Parish of Terrebonne, State of Louisiana, and received by counsel for petitioner on October 26, 1981.

(f) Petitioner's October 22, 1981 Motion to vacate and set aside the October 9, 1981 denial of rehearing as having been inadvertently and prematurely acted upon.

(g) The Supplemental Brief in support of petitioner's Application for Rehearing filed in the Supreme Court of Louisiana on October 30, 1981.

(h) The letter of the Clerk of the Supreme Court dated November 16, 1981, reading as follows:

"Hon. Frank W. Summers
Chief Justice Retired
102 Charity Street
P.O. Box 87
Abbeville, Louisiana 70510

Re: No. 81-C-0531
Terrebonne Parish Police Jury
vs. Carroll Matherne

Dear Chief Justice Summers:

This is to advise that the Court took the following action, this date, in the above mentioned entitled manner.

'The motion and brief on behalf of the defendant have been considered by the Court. Treating the matter as an application for

reconsideration, it is denied.'

With kindest regards, I remain,

Very truly yours,
(s) Frans. J. LaBranche, Jr.
Frans. J. LaBranche, Jr.
Clerk of Court

FJL, Jr./kt
ccs: A. J. Gray, III Esq.
H. Minor Pipes, Sr. Esq.
Michael J. Samanie, Esq.
Hon. Edward Geghers
Hon. I. Robert Boudreaux"

(i) The opinion and judgment of the Court of Appeal, First Circuit, State of Louisiana, rendered January 26, 1981, and reported in 394 So. 2d 1302.

(j) The unreported judgment and opinion of Judge Paul R. Wimbish of the Thirty-second Judicial District Court, Parish of Terrebonne, rendered on May 19, 1981 and May 20, 1981 respectively.

JURISDICTION

The decision of the Supreme Court of Louisiana was entered on September 8, 1981, Application for Rehearing was denied on October 9, 1981 and Motion and Order for Reconsideration was denied on November 16, 1981.

Petitioner contended throughout the proceedings in the courts below that the actions of the Police Jury in deepening and widening a drainage canal on his property, dumping spoil thereon, and destroying trees and drains on his property, all without permission or authority, deprived him of due process of law and constituted a taking of his property without compensation.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUS INVOLVED

U.S.C. Const., Amendment V in pertinent part:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S.C. Const., Amendment XIV in pertinent part:

" * * * nor shall any State deprive any person of life, liberty, or property, without due process of law."

Louisiana Constitution, Article 1, Section 2 (1974):

"No person shall be deprived of life, liberty or property, except by due process of law."

Louisiana Constitution, Article 1, Section 4 (1974) in pertinent part:

"Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power."

"Property shall not be taken or damages by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into Court for his benefit * * * ."

Section 1257 of Title 28 of the United States Code in pertinent part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows * * * :

(3) By writ of certiorari where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statues of, or commission held or authority exercised under, the United States."

Section 2101 of Title 28 of the United States Code in

pertinent part * * * :

"(c) Any other appeal of any writ of certiorari intended to bring any judgement or decree in a civil action, suit or preceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rule 22(3) of the Supreme Court of the United States in pertinent part * * * :

"A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law. See 28 U.S.C. 2101(c)."

Louisiana Revised Statutes 38:113:

"The various levee and drainage districts shall have control over all public drainage channels within the limits of their districts and for a space of one hundred feet on each side of the channel, selected by the district and recommended and approved by the Department of Public Works, whether the drainage channels have been improved by the levee or drainage district, or have been adopted without improvement as necessary of or extensions to improved drainage channels, and may adopt rules and regulations for preserving the efficiency of the drainage channels."

STATEMENT OF THE CASE

History:

Petitioner, Carrol J. Matherne ("Matherne") owns an 800 acre tract of land in Houma, Louisiana. The tract is highly developed, extremely valubable, agricultural land. The property is bounded on the north by a canal ("Canal C") which was constructed approximately 40 years ago by Matherne's ancestor-

in-title (Tr. 65, 256). Matherne's property ownership extends three-quarters into the width of Canal C (Tr. 65, 70, Exh. D-4). Matherne's property has traditionally drained into Canal C.

During December, 1979, the Police Jury of Terrebonne Parish, Louisiana ("the Police Jury") completed a forced drainage project involving approximately 1700 acres. The project is known as Forced Drainage Project 1-1A ("the project") and roughly one-third of its area is a developed residential subdivision. The project, which is irregular in shape, is partially bounded on the south by Canal C and on the north by Bayou Terrebonne (Tr. 93).

In designing the forced drainage project it was the intention of the police jury to drain the lands of the project into Canal C and pump this water from Canal C with the discharge outside the project (Tr. 93-94). It was not of the intention of the police jury to block existing drainage or to include Matherne's property within the project (Tr. 139).

During construction of the project, the Police Jury physically entered Matherne's property without permission and without attempting to acquire rights thereto either by conventional agreement or through eminent domain proceedings (Tr. 81, 255). The Police Jury cleaned and widened Canal C to accommodate the drainage from the lands within the drainage project (Tr. 99, 212-215). In doing so, the Police Jury entered Matherne's property and during this tortious invastion of private property, the Police Jury cut several hundred trees and created a spoil and debris "levee" along the bank of the canal on Matherne's property (Tr. 10 Exh. D-7-18).

For approximately 40 years, several ditches, approximately six feet deep, and twenty-five smaller ditches, two to three feet deep, had drained into Canal C. (Tr. 72-73; 78-79). The spoil bank and debris "levee" impeded and blocked the traditional drainage pattern of Matherne's property; despite testimony by the engineer employed by the Police Jury to design the project, that is was never intended that the project would block the natural drains of Matherne's property into Canal C (Tr. 139).

The deepening and widening of Canal C, which was part of the drainage project and the entry onto Matherne's property occurred prior to December 6, 1979. Within ten days after the

deepening and widening of Canal C, Matherne became aware of the blockage of his ditches caused by the Police Jury's actions (Tr. 259).

After Matherne cleaned out the blockage about the middle of December, 1979, the situation remained unchanged until April 12 and 13, 1980. Within 31 hours on those two days 11½ inches of rain fell on the drainage project and the surrounding area. The rainfall was so intense and widespread that Bayou Terrebonne overflowed into the project. The combination of the intense rainfall on the project and the overflow of Bayou Terrebonne flooded some streets in the subdivision and low-lying area within the drainage district. As a result the authorities were beset by many calls from residents complaining of the threat of the rising water to their houses. No one had ever witnessed such a heavy rainfall and such flooding in this area before. Under these circumstances pumping was to some extent ineffective (Tr. 129-130). Then, on April 13, the rain subsided, water in Bayou Terrebonne descended, and the overflow into the project from that stream ceased.

The drainage district then started pumping, but the water level fell slowly (Tr. 129-130). In an effort to determine the cause, S.P. Brunet, an employee, was dispatched to the area along Canal C. He counted 30 ditches, 28 small and 2 large ones, all emptied the water draining from Matherne's property into Canal C (Tr. 149). A strong current flowed from Matherne's property through the two large ditches into Canal C (Tr. 157).

Brunet reported his findings, whereupon the Police Jury employees entered Matherne's property with dirt moving machines and plugged or dammed both large ditches. In order to restore the drainage to his property, Matherne again reopened one of the ditches the Police Jury had dammed, leaving the largest of the two ditches dammed. Two large ditches were then open to permit Matherne's property to drain into Canal C. Later the Police Jury again entered Matherne's property without his permission and dammed the two large open ditches (Tr. 152-158).

When Matherne declared he would again open the dammed ditches, these proceedings followed in which the Police Jury obtained a preliminary injunction restraining Matherne from interfering with the drainage project, particularly with reference to

the area along the drainage canal forming the boundary between the drainage project and Matherne's property.

Federal Questions First Raised

The federal questions to be reviewed herein were first raised, orally, in the trial court on May 9, 1980, during the hearing on a Rule to Show Cause why a Preliminary Injunction Should Not Issue (Tr. 208-210). Pertinent quotations regarding the federal questions are as follows:

> At the hearing in the trial court on May 9, 1980, reference was made to the Louisiana statute involved herein, *i.e.*, Revised Statute 38:113:
> "*MR. GRAY* [Counsel for Petitioner]:
> " * * * What we are dealing with here is the Police Jury going on the land without the authority and conducting operations other than those necessary to preserve the efficiency of the channel. *We are dealing now with due proces, we are dealing with the constitutional right of protection of property.* This must be followed by appropriate expropriation law, none of which has been done."
> (Tr. 209) (Emphasis added)

The trial judge requested that memoranda of authorities be submitted regarding La. R.S. 38:113 ("the statute") (Tr. 260-261).

In his brief at the trial, petitioner Matherne, at page 51, invoked Section 4 of Article 1 of the Louisiana Constitution, which provides in pertinent part:

> "Property shall not be taken or damaged by the state or its political subdivision except for public purposes and with just compensation paid to the owner or into Court for his benefit."

In argument on page 52 of that brief it is asserted: "The actions of the Terrebonne Parish Police Jury are flagrantly in violation of Matherne's constitutional rights."

While the Constitution of the United States is not specifically mentioned, the pertinent principles of the 5th and 14th Amend-

ments, that private property cannot be taken without due process and adequate compensation, are the same as that provided for in the Constitution of Louisiana. Matherne's property was taken for public use and he recieved no compensation. There was no expropriation proceeding and he was denied due process of law. The Police Jury had usurped rights on his property which could only be exercised with a right-of-way permit or by expropriation.

The trial court subsequently ruled that although "the work" of the police jury "*was* conducted on the private property of Mr. Matherne" (Tr. 28), La. R.S. 38:113 "does, in fact convey the authority to the Jury to take such action" and to grant the injunction (Tr. 28-29).

Following issuance of the preliminary injunction, Matherne appealed to the State of Louisiana, Court of Appeal, First Circuit (Tr. 58). The federal questions were reiterated on appeal, *i.e.*, the specifications of error raised at the appellate level were as follows:

> "1.
>
> Does La. R.S. 38:113 convey authority to a police jury to take and damage private property without payment of just compensation and/or without acquisition of ownership through eminent domain proceedings?
>
> 2.
>
> Is an injunction the proper remedy for a policy jury to prevent a landowner from interfering with unconstitutional acts of the police jury committed on the landowner's private property?
>
> 3.
>
> Did the police jury's drainage project impede and/or block the traditional drainage of the subject property?"[1]

Additionally, Matherne urged on appeal:

> "The judgment of the trial court is in manifest error in

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[1]Matherne's brief is found following page 263 of the record of this matter.

> ruling that La. R.S. 38:113 conveys authority to a police jury to enjoin a landowner from "interfering" with unconstitutional acts of the police jury committed on the landowner's private property. The ruling of the trial court constitutes a flagrant abuse of constitutional guarantee of protection of individual and property rights."

In its brief in the Court of Appeal, at page 4, [the Police Jury] argued against Matherne's charge that it violated his constitutional rights: "It (the Police Jury) has not sought ownership of appellant's land nor taken any actions which could be construed as taking or damaging property within the scope of expropriation."

At page 5 the argument continues: "As shown before, the actions of appelle did not constitute a "taking" of property, but were merely remedial and completely authorized by said statute." [Note the statute referred to, La. R.S. 38:113, was held by the Louisiana Supreme Court to confer limited authority on the Police Jury and it did not authorize the actions of the Police Jury here.]

In his reply brief in the Court of Appeal Matherne restates the argument, at page 5, viz: ". . . the record of this case clearly reflects that the traditional drainage patterns on the subject property was impeded and/or blocked by *the Police Jury's unconstitutional acts.*" (Emphasis added). And also, concluding, at page 6, "The ruling of the trial court constitutes a flagrant abuse of constitutional guarantee of protection of individual and property rights."

The appellate court upheld the injunction and Matherne applied for certiorari which was granted by the Supreme Court of Louisiana.

The issues presented to the Supreme Court of Louisiana were as follows:

> "1.
>
> The Court of Appeal erred in ruling that La. R.S. 38:113 conveys authority to a police jury to permanently take and damage private property without acquisition of ownership through eminent domain proceedings and without prior payment of just compensation.

2.

The Court of Appeal erred in ruling that an injunction against the landowner is the proper remedy for a policy jury to acquire permanent control over private property adjacent to a drainage channel."

Additionally, Matherne pointed out to the Supreme Court of Louisiana that the Court of Appeal ruled at Page 5 of its opinion:

"It [the police jury] has not claimed ownership of either the canal or the land adjacent to it nor has it acquired such. * * * The police jury asserts that it did not 'take' Matherne's property. The Court of Appeal maintained the injunction against Matherne, *effectively limiting the owner's use of his own private property.* * * *

"This Honorable Court has previously ruled that since a taking or damaging of property may in fact occur without expropriation proceedings by a public body through oversight or lack of foresight, there must be some proceeding whereby an owner may seek redress when this property is damaged or taken without the prior exercise of eminent domain. Such an action is often referred to as *'inverse condemnation'* and Article 1, Section 2, and Article 4, Section 15, support a proceeding. *Raymond v. Department of Highways,* 231 So. 2d 375 (La. Sup. Ct. 1970); *Boothe v. Department of Public Works,* 370 So. 2d 1282 (La. App. 3rd Cir. 1979) *writ denied* 374 So. 2d 661 (1979); *Key v. Louisiana, Department of Highways,* 357 So. 2d 1230 (La. App. 2nd Cir. 1978).

By maintaining the issuance of the preliminary injunction against Matherne concerning the properties in dispute, *the Courts below effectively denied Matherne the right to seek the remedy of inverse condemnation."* (Emphasis added)

Matherne reiterated to the Supreme Court of Louisiana:

" . . . it is respectfully submitted that expropriation and payment of just compensation is the proper procedure. The injunction issued by the trial court and affirmed by the Court

of Appeal is in error and derogation of the *constitutional right to own and protect private property.*" (Emphasis added)

The opinion and judgment of the Supreme Court of Louisiana is sought for review by this Honorable Court. That opinion upheld the issuance of the injunction (Appendix).

At the outset of its opinion the Supreme Court of Louisiana declared, "We granted certiorari to determine whether the action below constituted a taking or damaging of property for a public purpose without just compensation." 405 So. 2d 314.

Matherne's Application for Rehearing, last page, restates the issue:

> "This controversy involves a violation of constitutional rights and guarantees of protection of private property. The injunction as issued by this Honorable Court permanently restricts a landowner from removing spoil, of which he is the owner, and authorizes permanent interference with the drainage of private property as it has existed for approximately forty years." (Appendix)

The relevant principles embodied in the United States Constitution have been repeatedly urged at all stages of these proceedings. (U.S. Const. Amend. XIV, Sec. 1 and Amend. V). And, if any doubt existed that the protection of our Nation's organic law is sought, the concluding paragraph of Matherne's supplemental brief in support of the application for rehearing should set this doubt at rest:

> "The effect of the injunction issued in this case, if allowed to stand, will constitute a taking of Matherne's property without compensation and without due process contrary to the guarantees of the Constitution of the State of Louisiana and the United States."

ARGUMENT

This proceeding involves a significant constitutional issue which has not as yet been decided by this Honorable Court. The issue to be decided concerns the extent to which a governing body

can conduct activities upon private property and the effects thereof. The extent to which private property can be affected by governmental activities is the subject of recent decisions by this Honorable Court. *Hodel v. Virginia Surface Min. & Reclam. Assoc.*, 101 S. Ct. 2352 (1981); *San Diego Gas & Electric Co. v. City of San Diego*, 101 S. Ct. 1287 (1981).

This Honorable Court and other federal courts have established criteria which constitute violations of the Fifth and Fourteenth Amendments. Summarized, the criteria[2] are as follows:

(1) governmental action;
(2) physical invasion of private property;
(3) interference or deprivation of owner's use and/or enjoyment of property;
(4) surrender of a portion of property and/or transfer of control;
(5) affect on owner's ability to transfer property; and
(6) interference with owner's reasonable investment backed expectations.

In the instant case, the following facts were established, *i.e.*, that the Police Jury:

(1) entered upon Matherne's property without permission;
(2) deepened and widened Canal C (at least ten (10') feet into

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[2]See *State of Minnesota By Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981); *Hodel v. Virginia Surface Min. & Reclam. Assoc.*, 101 S.Ct. 2352 (1981); *United States v. City of Pittsburgh, Cal.*, 661 F.2d 783 (9th Cir. 1981); *San Diego Gas & Electric Co. v. City of San Diego, 101 S.Ct. 1287, (1981); Agins v. City of Tiburon*, 447 U.S. 225, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 82, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174, 100 S.Ct. 383, 390, 62 L.Ed. 332 (1979); *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979); *Florida East Coast Prop. v. Metropolitan Dade Cty.*, 572 F.2d 1108 (the Cir. 1978) *cert. denied* 493 U.S. 894, 99 S.Ct. 253, 58 L.Ed.2d 250 (1979); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 9 L.Ed.2d 130 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958). See also *United States v. Clark*, 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980) and *Pennsylvania Coal Co. vs. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

the property owned by Matherne);
(3) cut several *hundred* trees;
(4) piled debris and constructed upon the canal bank owned by Matherne, a spoil levee which blocked existing canals which traditionally drained into Canal "C"; and
(5) the above four actions have resulted in a continuous legal controversy with Matherne, said controversy culminating in the issuance of an injunction which prohibits acts of Matherne upon his own private property.

The above actions and the effect of the injunction issued in this case, if allowed to stand, will constitute a taking of Matherne's property without compensation and without the due process of law contrary to the guarantees of the Constitution of the United States and the Constitution of the State of Louisiana.

While failing to apply the mandates of Article 1, Sections 2 and 4 of the Louisiana Constitution and not heeding the incessant constitutional pleas of petitioner, the Supreme Court of Louisiana has decided this case contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, by permitting the taking of petitioner's property for a public use without just compensation or due process of law. The protections afforded by Louisiana's Constitution are more demanding than those of the Constitution of the United States.

Although the opinion of the Supreme Court of Louisiana denied relief to petitioner on the merits, the opinion otherwise favors Matherne's position in two signficant particulars:

(1) The Court has correctly decided that Section 113 of Title 38 of the Revised Statutes of Louisiana does not authorize the taking or damaging of private property without compensation or due process of law [expropriation] as occurred in this case. (405 So. 2d 314, at 317).

Implicit in this holding, as a factual matter, is the recognition that the Police Jury did take Matherne's property without compensation.

(2) In petitioner's view the Court correctly found that water on Matherne's 800 acre tract of land flowed naturally into Canal C when the Court found his 800 acres to be the dominant estate and

the Police Jury drainage project to be the servient estate as those terms are understood in Articles 655 and 656 of the Civil Code of Louisiana. 405 So. 2d 314, at 317. These articles, in pertinent part, provide:

> Article 655: "An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow."
>
> Article 656: "The owner of the servient estate may not do anything to prevent the flow of water. The owner of the dominant estate may not do anything to render the servitude more burdensome."

By determining that Matherne's property was the dominant estate and that the Police Jury drainage project was the servient estate, the Court finds, in effect, that the waters from Matherne's lands flow naturally to and across the lands within the drainage project. Otherwise the Court would not have applied Articles 655 and 656 of the Civil Code governing natural drainage affecting dominant and servient estates.

It is not conceded that an estate which has been converted into a forced drainage project by a public body continues to enjoy the privileges it could claim from a dominant estate, insofar as drainage is concerned. By establishing an artifically drained area, a forced drainage project, the Police Jury has changed the natural character of the estate involved, removing it from principles of law which govern natural drainage. Added to this is the fact that the character of the land within the drainage district was altered appreciably by its partial development into a subdivision for residences. Undoubtedly this alteration of the land created additional drainage problems - one of which, it is inferred, would be to empty more water into Canal C at an accellerated rate. If such were the case, however, and the drainage project could be considered a servient estate, Matherne did not interfere with the drainage project as the Court found, because he was doing what he had a right to do upon his own private property.

We agree with the pronouncement of the Court, where it was written:

> "The owner of the dominant estate may make all drainage works which are necessary to the proper cultivation and to the agricultural development of his estate. To that end, he may cut ditches and canals by which the waters running on his estate may be concentrated, and their flow increased beyond the slow process by which they would ultimately reach the same destination." (405 So. 2d 314, at 318)

What this quoted language says is precisely what Matherne did. Reference to Matherne's Exhibit D#3, an official aerial photograph of the U.S. Department of Agriculture, depicts a comprehensive record of the development of the drainage system on Matherne's property, indicating the natural drain into Canal C. This evidence, recorded over many years, fully corroborates the repeated testimony of Matherne, a life long resident of the area, to the effect that Canal C was excavated approximately 40 years ago by Southdown Plantation, one of his predecessors in title, and the spoil was used to construct a levee on the north bank to facilitate drainage of the 800 acres subsequently acquired by Matherne.

Testimony of Godfrey Bourgeois, (Tr. 191, et. seq.), Merlin Bascale, (Tr. 215), and Charles Starkovick, (Tr. 235), all unbiased employees of the Agricultural Stabilization and Conversation Service, an agency of the United States Department of Agriculture, further support the Court's finding that Matherne's property drained naturally into Canal C.

The Court's finding, the aerial photographs and the impressive testimony of the Government employees must be weighed against the testimony of the witnesses for the Police Jury, all of whom were biased employees of that political body, who, nevertheless, did testify in some respects in favor of Matherne. For instance, Mr. Talbot, the engineer employed by the Police Jury to design the project, testified that it was never intended that the project would block the natural drains of Matherne' property into Canal C (Tr. 139). For that reason, when Canal C was deepened and widened prior to December 1979, there was, he said, no intention to

construct a levee which would be continuous and retain water on Matherne's property (Tr. 138). It was different, however, in April, 1980 when the heavy rains created a problem for the Police Jury with its residential subdivision constituancy. Then the Police Jury deliberately, intentionally and arbitrarily entered Matherne's land and dammed the ditches which had long served to support the natural drain of his property.

A fundamental question in this case, it is submitted, is resolved by the Supreme Court of Louisiana's determination that Matherne's property is the dominant estate and therefore flows naturally into Canal C. The record amply supports this finding as the pertinent portions referred to demonstrate.

In the Court's opinion it is stated, "Matherne had cut the ditches only a few weeks before." (405 So. 2d 314, at 316). Also, "Since the flow from Matherne's new ditches appeared to contribute substantially to the prolonged flooding in the project area, the Police Jury blocked the ditches on April 16 and 17." (405 So. 2d 314, at 316).

These erroneous statements overlook two important facts of which there is no contradiction in the record. The ditches were not "cut", *i.e.*, newly created, and they were not "new". (Tr. 71-75, 251-254).

Matherne testified that within ten days after the deepening and widening of Canal C in 1979, he became aware of the blockage of his ditches by the Police Jury (Tr. 259). This blockage occurred when the Police Jury dumped the spoil from the deepening and widening work onto his property and inadvertently or carelessly blocked his ditches where they entered Canal C. He therefore cleaned out the blockage about the middle of December 1979. The situation remained unchanged until the Police Jury reentered his property four months later, after the April 12 and 13, 1980 rains.

These uncontradicted facts establish that Matherne did NOT "cut" any "new" ditches "only a few weeks" before (Tr. 71-75, 251-254). To the contrary, he cleaned the debris from his ditches four months prior to the heavy rains on April 12 and 13, 1980 (Tr. 71). The significance of this protracted four month time interval is that the Police Jury was neither concerned nor opposed to Matherne's actions until they were confronted with a rainfall of

unprecedented proportions on April 12 and 13, 1980 (Tr. 259). Testimony to this effect was elicited by counsel for the Police Jury from Matherne on cross-examination as the last testimony of the trial. Unfortunately, in its opinion, the Court did not consider this important evidence.

The ditches involved were not "cut through" a "ridge", as the trial judge found. Canal C was dug by Southdown Plantation 40 years before the trial of this case (Tr. 65, 256). It was designed to drain the property now owned by Matherne. This fact is undisputed in the record.

Prior to that time and since the construction of Canal C the 800 acres now owned by Matherne were devoted to agricultural purposes, principally sugar cane and soybean farming. Throughout the 40 years following the digging of the Canal C, the lands bordering on the south bank of the canal were principally devoted to these row crops - cane and beans. In building the rows, furrows were made below the normal level of the land (Tr.232-233). When the implements, plows, etc., reached the vicinity of the canal, space was needed to turn around. These turn around areas were unplowed and, having received dirt dropped from the plows and other implements, were higher than the plowed areas between the cane rows (Tr. 169). A "build up" occurred, therefore, which impeded the flow of water from the furrows and the planted area generally.

Under these circumstances the farmer was required to cut small ditches, and an occasional larger ditch, through the turn around area to permit the water between the crop rows to drain into Canal C (Tr. 198-99, 220). There were, according to the Police Jury witnesses, 28 such small ditches and two large ditches which they observed. All of these drains became altered by maintenance during the 40 years the land was planted, principally under the supervision of an agency (ASCS) of the Department of Agriculture in keeping with the natural flow on the land (Tr. 202).

With the passage of time these ditches, especially the two large ones in controversy here, called "field ditches", were enlarged by erosion (Tr. 225, 231, 232). It was necessary, also, from time to time to rid the ditches of branches, weeds and other debris which was dumped along the south bank of Canal C.

Cleaning Canal C on occasion during the 40 years since its excavation also required that the spoil be piled along the banks of the canal. Thus, the build-up caused a so-called "ridge" to form. It was not a natural ridge obstructing the natural flow of water from Matherne's property into Canal C (Tr. 200).

Obviously, these ditches, large or small, were not new. They were, beginning forty years ago, made "necessary to the proper cultivation and to the agricultural development of his estate. To that end, he (the owner) may cut ditches and canals by which the waters running on his estate may be concentrated, and their flow increased beyond the slow process by which they ultimately reach the state destination." 405 So. 2d 314, at page 318. The large ditches were "old ditches" (Tr. 229).

At no time prior to the unprecedented rainfall of April 12 and 13, 1980 does this record evidence any complaint made by the Police Jury or the owners of the land which was later to become the forced drainage district. Canal C. had always served to receive the waters flowing into it from the adjoining lands. Matherne's property had the two large ditches long before he acquired it (Tr. 191-202; 222-234).

Finally, and most emphatically, the distress in which the drainage project found itself was not caused by any actions of Matherne.

It is the Police Jury's position that Matherne endangered the drainage system by removing the dam the Police Jury created in his ditches. Matherne urges that he did not endanger the project by restoring the ditches to the level they had before they were dammed by the Police Jury. What endangered the forced drainage project was the extraordinary rainfall -- 11½ inches within a brief 31 hours.

This unexpected widespread rainfall caused Bayou Terrebonne to overflow into the project (Tr. 106, 166). The bank of that bayou was the highest elevation of any boundary of the project. It is no wonder, then, that the southern boundary of the project, its lowest, also overflowed (Tr. 129). The real cause of the project's failure to withstand flooding, therefore, was an Act of God. Undoubtedly the designers of the project did not anticipate such a

heavy rainfall and they made no provision to guard against it (Tr. 145).

To accuse Matherne for the inadequacy of the project's design is an unfair and unfounded accusation. This injunction, we submit, was an effort on the part of the Police Jury to find a "scapegoat" for their failure to protect the residents of the subdivision within the project.

The Police Jury dammed the field ditches draining Matherne's property into Canal C to correct the deficiency of the project at Matherne's expense and without his permission - an outright, heavy-handed trespass. There is no evidence that Matherne's actions burdened the drainage of the project.

The effect of the injunction issued in this case, if allowed to stand, will constitute a taking of Matherne's property without compensation and without due process of law contrary to the guarantees of the Constitution of the United States and the Constitution of the State of Louisiana.

If this harsh injunction stands, the valuable, highly improved and productive agricultural lands of Matherne must remain encumbered by a prohibition against maintaining a system of drainage in aid of the natural flow of water from his land into Canal C.

A portion of Matherne's land was physically taken by the Police Jury when the canal was widened. The field ditches which are now dammed by tortious trespass by the Police Jury must remain in that condition, and, thus, will create drainage problems which will limit any economical viable use of his property. The injunction affirmed by the Supreme Court of Louisiana is in conflict with federal jurisprudence, *e.g., Agins v. City of Tiburon, supra; Kaiser Aetna v. United States, supra; State of Minnesota by Alexander v. Block, supra; Unitd States v. Dickinson, infra;* and *Florida East Coast Properties, Inc. v. Metropolitan Dade Cty., supra.*

Damage has unmistakeably occurred and will continue until the injunction is dissolved. A grevious wrong has been imposed upon this man's land and his right to the use and enjoyment of his property.

> "The prohibition against deprivation of property without due process of law reflects the high value, embedded in our constitution and political history, that we place on a person's right to enjoy what is his, free of governmental interference." U.S. Const. Amend. 14; *Fuentes v. Shevin,* 407 U.S. 62 (1972).

A temporary, nonfinal deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment. *Fuentes v. Shevin, supra.* Any significant taking of property by the state or its political subdivision, such as a Police Jury, is within the purview of the Due Process Clause. *Fuentes v. Shevin, supra.* See also *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Bell v. Burson,* 402 U.S. 535 (1971). Both *Sniadach* and *Bell* involved taking of property pending a final judgment in an underlying dispute.

While the facts of *Fuentes* are unlike the facts of the case at bar, the principles announced there are nevertheless applicable here for they are read broadly by the courts to extend protection to "any significant property interest", *Boddie v. Connecticut,* 401 U.S. 371, at 379 (1971), including statutory entitlements. See *Bell v. Burson,* 402 U.S., at 539; *Goldberg v. Kelly,* 397 U.S. 254, at 262 (1970)..

The injunction upheld by the Supreme Court of Louisiana prohibits Matherne

> "... from unblocking the large drainage ditches blocked by the Terrebonne Parish Police Jury ..." (Appendix)

The effects of the injunction are as follows: (1) to permanently control Matherne's actions upon his own property; (2) to maintain the blockage of Matherne's traditional drainage system and thus to interfere with his use of the property and with his plans for development and his reasonable investment backed expectations; (3) a surrender of that portion of his property; (4) a prohibition on Matherne's ability to transfer the ownership of the property; and (5) to create the possibility that each successive owner of the subject property must be enjoined.

By permanently blocking the traditional drainage pattern of the subject land, the best use of said land has been prevented. See *Agins v. City of Tiburon,* 477 U.S. 225, 100 S. Ct. 2138, 2142, 65

L.Ed.2d 106 (1980); *United States v. Causby,* 328 U.S. 256, 262, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946).

The injunction has deprived Matherne of his property by transferring control of that property to the parish governing authority—thus a taking has occurred in violation of the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment, *San Diego Gas & Electric Co. v. City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *State of Minnesota by Alexander v. Block, supra;* the landowner no longer has "full control" of his property, *United States v. City of Pittsburgh, Cal.,* 661 F.2d 783 (9th Cir. 1981); "a servitude has been acquired" without payment of just compensation, *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382 (1947).

The economic impact upon Matherne is to prevent and/or interfere with the development of his property. The historic use of said lands have been agricultural. The very ditches which drainage has been blocked by the injunction, were originally created for soybean and sugarcane farming and drainage purposes. Matherne's reasonable investment backed expectations have been interfered with by the physical invasion, destruction of hundreds of trees and by blocking the land's traditional drainage patterns. *Hodel v. Virginia Surface Min. & Reclam. Association,* 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Kaiser Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)

Fifth and Fourteenth Amendments forbid both Federal Government and States from depriving any person of life, liberty or property without due process of law. U.S. Const. Amends. 5, 14; *Bloom v. State of Illinois,* 391 U.S. 194 (1968).

The Supreme Court of Louisiana denied Matherne's Application for Rehearing on October 9, 1981, even though it had granted an extension of time through November 2, 1981 for the filling of a supplemental brief.

CONCLUSION

All courts below agree that the Police Jury entered Matherne's property without permission, physically took part of his property

to widen Canal C., dammed ditches on his property which impeded drainage of his lands, dumped spoil on his property and felled trees, causing great and continuing damage, all without Matherne's permission.

The Court of Appeal, First Circuit, State of Louisiana sought to justify this "taking" of Matherne's property, reasoning that Section 113 of Title 38 of the Revised Statutes of the State of Louisiana authorized the Police Jury's actions.

The Supreme Court of Louisiana reversed the Court of Appeal, holding that the actions of the Police Jury could not be approved upon the authority of La. R.S. 38:113, ruling, however, that Matherne's actions in removing the blockage from his ditches made the servitude of drain owed to the drainage project by Matherne's estate more burdensome, contrary to Articles 655 and 656 of the Civil Code of Louisiana.

The decision of the Supreme Court of Louisiana was based upon the erroneous conclusions that the drainage project was a servient estate and that Matherne "cut" two or more "new" ditches only a "few weeks before" the heavy rains of April 12 and 13, 1980. This Honorable Court may make independent inquiry into disputed facts, 28 U.S.C 1257; *Whitus v. State of Georgia*, 87 S.Ct. 643 (1967).

The decision of the Supreme Court of Louisiana should be reversed and set aside, and the injunction issued in this case vacated.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing Petition for Certiorari to the United States Supreme Court has been served upon the Terrebonne Parish Police Jury by mailing three copies to its counsel of record, Michael J. Samanie, Esquire, 525 East Park Avenue, Houma, Louisiana 70360, by United States mail, postage prepaid, properly addressed.

Abbeville, Louisiana, this _____ day of January, 1982.

FRANK W. SUMMERS

Appendix

APPENDIX

SUPREME COURT OF LOUISIANA

NO. 81-C-0531

TERREBONNE PARISH POLICE JURY

Versus

CARROLL MATHERNE

ON WRIT OF REVIEW TO THE COURT OF APPEAL,
FIRST CIRCUIT,
PARISH OF TERREBONNE.

DENNIS, Justice.

The question presented for our decision is whether a parish governing authority may have a landowner enjoined from diverting his property's drainage from its natural flow and destination into a parish drainage project because the diversion of the natural drain impairs the efficiency of the public drainage system and contributes to the flooding of homes. The district court granted an injunction and the court of appeal affirmed. We granted certiorari to determine whether the action below constituted a taking or damaging of property for a public purpose without just compensation. We affirm. An injunction preventing a landowner from diverting the natural drain of his property is not a taking or damaging of his property because he has no right to do anything to render the natural servitude of drain more burdensome upon the estates situated below. The parish governing authority was entitled to have the landowner's unlawful acts enjoined in order to prevent irreparable injury to its drainage project.

The Terrebonne Parish Police Jury completed in December, 1979 Forced Drainage Project No. 1-1A. This project was designed to drain about 1700 acres and provide flood control for roughly 2200 residents.

Carroll Matherne owns an 800-acre tract of agricultural land

south of the project area. The northern boundary of his land is formed by "Canal C," an artificial, non-navigable drainage canal constructed many years ago by one of his ancestors in title. The canal which serves as a public drainage channel for the project also forms its southwestern boundary. Matherne's property, which is mostly farmland, was not included within the project.

On April 12 and 13, 1980, heavy rains of approximately eleven inches drenched the area causing severe flooding. When the drainage system failed to perform satisfactorily, employees of the police jury inspected the drainage channels and found two large ditches on defendant's property emptying substantial quantities of water into Canal C. Matherne had cut the ditches only a few weeks before. Since the flow from Matherne's new ditches appeared to contribute substantially to the prolonged flooding in the project area, the police jury blocked the ditches on April 16 and 17. After closure of the cuts, standing water in the residential area within Project 1-1A subsided as much as twelve inches in twelve hours. Matherne reopened one of the two ditches, began digging a third ditch, and ordered parish employees from his property when they attempted to close them. The police jury obtained a temporary restraining order enabling it to reclose the new ditches and to prevent further resistance by defendant until a hearing could be held.

After a full hearing, the trial court granted a preliminary injunction. The trial judge in his written reasons found that before Matherne cut the new ditches only 120 of his 800 acres drained into Canal C. By reversing the drain of additional portions of his property the trial judge found, the defendant had introduced substantially more water into the forced drainage project than it was designed to handle. The trial court concluded the La. R.S. 38:113 entitled the police jury to injunctive relief to prevent defendant from destroying the integrity of the drainage system and doing irreparable harm to residents within the project area.

Matherne appealed and the court of appeal affirmed the preliminary injunction judgment. 394 So. 2d 1302 (La. App. 1st Cir. 1981). The court of appeal held that by authority of La. R.S. 38:113 the police jury had acquired a limited servitude to control and maintain Canal C as a public drainage channel extending for a

space of 100 feet on each side of the channel; that the police jury may take any appropriate measures for the preservation of the efficiency of the drainage channel; that, because Canal C is part of a parish drainage project, the police jury may enjoin the activity of a landowner outside the project which overloads the drainage channel and thereby reduces its efficiency as part of the drainage project; and that, if the police jury has taken or damaged Matherne's property, he must pursue other available remedies outside the injunction proceeding.

We granted certiorari because of our concern that the lower courts' sweeping interpretation of a local government's powers under La. R.S. 38:113 impinges upon individual citizens' rights to own, use and enjoy private property. Our review convinces us that the trial and appellate courts' statutory construction is partially incorrect, but we conclude that the judgments should be affirmed on other grounds, although the language of the injunction must be restricted somewhat.

I.

Property may not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. *La. Const. art. 1* § 4. In every expropriation, a property owner has the right to a trial by jury to determine compensation and the right to be compensated to the full extend of his loss. *Id.* Due process of law guarantees a property owner a judicial review of whether the government acted arbitrarily, capriciously, or in bad faith in determining that the taking or damage of property was necessary. *State, thru Dept. of Highways v. Olinkraft, Inc.*, 350 So. 2d 865 (La. 1977). *Cf. State, thru Dept. of Highways v. Jeanerette Lumber & Shingle Co., Ltd.*, 350 So. 2d 847 (La. 1977).

La. R.S. 38:113 provides:

"The various levee and drainage districts shall have control over all public drainage channels within the limits of their districts and for a space of one hundred feet on each side of the channel, selected by the district and recommended and approved by the Department of Public

> Works, whether the drainage channels have been improved by the levee or drainage district, or have been adopted without improvement as necessary parts of or extensions to improved drainage channels, and may adopt rules and regulations for preserving the efficiency of the drainage channels."

La. R.S. 38:113, by its terms merely authorizes a levy (sic) or drainage district to preserve and maintain the efficiency of public drainage channels within its districts. Undoubtedly, the local governing body may exercise its power to prevent obstruction of the channels and to perform ordinary maintenance necessary for the efficient operation of the canals and ditches. When necessary for these purposes, the authorities may send their workers and equipment on to private property along public drainage channels for a space of 100 feet on each side of the channel. The legislative aim was a modest one, viz., to enable levy and drainage authorities to keep the public drainage channels within their districts clear and in working order. See *Dugas v. St. Martin Parish Police Jury*, 351 So. 2d 271 (La. App. 3rd Cir. 1977); *Grayson v. Comm'rs of Bossier Levee Dist.*, 229 So. 2d 139 (La. App. 2d Cir. 1969); *Scott v. Red River-Bayou Pierre Levee & Drainage Dist. of La.*, 7 So. 2d 429 (La. App. 2d Cir. 1942).

The statute does not authorize the taking or damaging of private property without just compensation or without due process of law; nor do we think the legislature could do so constitutionally. Accordingly, we must reject the lower courts' interpretation of La. R.S. 38:113 as an impingement upon an individual's constitutional right to property and as unjustified by the words of the statute. The statute does not authorize the governing authority to enjoin activities on private property which do not have the effect of obstructing a public drainage channel or impeding its maintenance. The act certainly does not enable a local government to take or damage property righty by way of injunction. See *Plaquemines Parish Comm'n Council v. Hero Lands Co.*, 388 So. 2d 790 (La. 1980). It may be desirable and in the public interest to take property or prevent it enjoyment in order to promote the overall efficiency of a drainage system. The lawful method, however, is

through expropriation and not by enjoining an owner from use of his property rights. See *Arkansas Louisiana Gas Co. v. City of Minden,* 341 So. 2d 607 (La. App. 2nd Cir. 1977).

2.

The injunction preventing Matherne from diverting the natural drain of his property was not a taking or a damaging of his property, however, because he had no right to do anything to render the natural servitude of drain more burdensome on estates situated below. Under the conception of our law, the right to drain water from one's property over the lands of others is not a prerogative of ownership but a real right of servitude requiring a dismemberment of the ownership of others or a charge laid on their immovables. *La. C.C. art. 646, et seq., 1977 La. Acts, No. 514, Expose' des Motifs.*

The articles of the code governing the servitude of drain, in pertinent part, provide:

> Art. 655. An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow. (Acts 1977, No. 514).
> Art. 656. The owner of the servient estate may not do anything to prevent the flow of the water. The owner of the dominant estate may not do anything to render the servitude more burdensome. (Acts 1977, No. 514).

Our jurisprudence has established a consistent interpretation of these precepts. The owner of the lower lands of two estates can do no act which would impede the natural flow of waters on his lands from those of the higher estate. The owner of the dominant estate may make all drainage works which are necessary to the proper cultivation and to the agricultural development of his estate. To that end, he may cut ditches and canals by which the waters running on his estate may be concentrated, and their flow increased beyond the slow process by which they would ultimately reach the same destination. But the owner of the dominant estate cannot improve his lands to the injury of his neighbor by diverting

waters from their natural flow, and concentrating them so as to flow on the lower lands of the servient estate at a point which would not be their natural destination, thus increasing the volume of water which would by natural flow run over or reach any portion of the servient estate, and to thus render the servitude due by the estate below more burdensome. *E.g., Nicholson v. Holloway Planting Co., Inc.*, 255 La. 1, 229 So. 2d 679 (1969); *Broussard v. Cormier*, 154 La. 877, 98 So. 403 (1923); *Ludeling v. Stubbs*, 34 La. Ann. 935 (1882); *Guesnard v. Executors of Bird*, 33 La. Ann. 796 (1881); *David v. Dixie Rice Agricultural Corp.*, 379 So. 2d 62 (La. App. 3d Cir. 1979), *writ denied*, 382 So. 2d 166 (La. 1980).

Testing the facts of this case by the codal precepts as thus interpreted, we conclude that Matherne's efforts to alter the natural drainage of his land exceeded his lawful rights as owner of a dominant estate. By cutting new ditches through the natural ridge bordering Canal C, Matherne diverted the drainage from most of his estate away from its natural flow, prevented it from reaching its natural destination and rendered more burdensome the servitudes due by the lower estates receiving Canal C's water by substantially increasing its volume.

3.

Because the record does not establish that the police jury was owner of a servient estate or neighboring property overburdened or damaged by Matherne's activities, we initially questioned the governing authority's standing to bring this suit. After considering the problem, however, we conclude that the police jury has standing to sue and is entitled to injunctive relief.

A party seeking an injunction must have standing to sue or, more comprehensively, the action must present a justiciable controversy. *Stoddard v. City of New Orleans*, 246 La. 415, 165 So. 2d 9 (1964); *Cf. Maraist, Work of Appellate Courts—1974-1975*, 36 *La. L. Rev. 556; Moore, Federal Practice*, § 65.17. To have standing the plaintiff must assert an adequate interest in himself, which the law recognizes, against a defendant having a substantial adverse interest. *La. C.C.P. art.* 681; *La. Hotel-Motel Ass'n, Inc. v. Parish of East Baton Rouge*, 385 So. 2d 1193 (La. 1980); *Hainkel v. Henry*,

313 So. 2d 577 (La. 1975); *Abbott v. Parker,* 259 La. 279, 249 So. 2d 908 (La. 1971). The fact that the plaintiff may suffer damage will not suffice unless he has a right, which the law will recognize, to be immune from damage by the defendant. *League of Women Voters v. City of New Orleans,* 381 So. 2d 441 (La. 1980); *Abbott v. Parker,* 259 La. 279, 249 So. 2d 908 (La. 1971); *Moore, Federal Practice,* § 65.17.

The police jury in this case has a right, which the law has recognized, to be immune from damage by Matherne's actions in overburdening the natural servitude of drain. The governing body is authorized to adopt rules and regulations for preserving the efficiency of channels within its drainage district. La. R.S. 38:113. In aid of this local government power, the legislature also enacted criminal sanctions prohibiting obstruction of drainage channels, La. R.S. 38:219, or "[d]rain[age] into channels by natural or artificial inlets except under regulations prescribed by the district, . . . La. R.S. 38:219 (6). By analogy to these criminal statutes we conclude that the police jury enjoys a substantive civil right to be immune from damage to its public works project by excessive, unlawful drainage into its system. *Boyer v. Johnson,* 360 So. 2d 1164 (La. 1978); *Pierre v. Allstate Insurance Co.,* 242 So. 2d 821 (La. 1970); *Cf. A. Yiannopoulos, Louisiana Civil Law System,* 153 (1977). As we noted earlier in this opinion, these statutes cannot authorize the police jury to take or damage property without just compensation. The regulation or prohibition of drainage into a public system that is not authorized by a natural servitude or other legal right, however, does not constitute a taking or damaging of property.

La. C.C.P. art. 3601 provides that an injunction shall issue where irreparable injury, loss or damage would otherwise result to the applicant. Irreparable injury is considered to be a loss sustained by an injured party which cannot be adequately compensated in money damages or for which such damages cannot be measured by a pecuniary standard. *Pennington v. Drews,* 209 La. 1, 24 So. 2d 156 (1945); *City of Lake Charles v. L. & W. Co.,* 144 La. 217, 80 So. 260 (1918). Matherne's unauthorized activity on his land caused a dramatically increased flow of water into the forced drainage system which significantly reduced the ability of

the system to drain the watershed area quickly and efficiently. The system had not been designed to drain the bulk of defendant's agricultural property and Matherne's unilateral decision to use it for this purpose rendered the entire project inadequate to protect residential property it was designed to serve. Furthermore, Matherne testified that he would reopen the ditches if not enjoined from doing so.

Under these circumstances, the record sufficiently demonstrates the police jury's standing to sue and the potential irreparable damage to its drainage system that will result in the absense of injunction relief. The language of the trial judges injunction must be modified, however, to conform with a narrower view of the police jury's authority. The judgment is amended as follows:

It is decreed that a preliminary injunction issue against Carroll J. Matherne, prohibiting him, his agents, employees, and servants from unblocking the large drainage ditches blocked by the Terrebonne Parish Police Jury, from digging other such ditches in the future, and from diverting waters from his property into "Canal C" a/k/a Bayou Tecon which would not otherwise naturally flow into that canal.

AMENDED AND AFFIRMED.

★ ★ ★

Supreme Court of Louisiana

NO. 81-C-0531

TERREBONNE PARISH POLICE JURY

Versus

CARROLL MATHERNE

LEMMON, Justice, Concurring.

Prior to the drainage project undertaken by the Police Jury, a system of ditches had drained part of Matherne's property into Canal C. Matherne contends that a spoil levee placed along the bank of Canal C during the construction of the project blocked that

pre-existing drainage and that he merely unblocked the blockage caused by placement of the spoil levee. If these were the complete facts shown by the record, then I would agree with his contention that he had the right to remove the spoil levee constructed without a servitude being expropriated or obtained by contract.

However, the record further establishes that Matherne also cut new ditches across a ridge south of Canal C. Prior to that action only 120 acres drained into Canal C, whereas after that action most of the remainder of the 800-acre tract also drained into the canal. Therefore, that action by Matherne did render the servitude of drainage more burdensome on the servient estate, and the Police Jury properly sought to halt the increased flow resulting from Matherne's action.

Nevertheless, Matherne apparently still has an action for damages caused by the unauthorized taking or damaging of his property in the course of constructing the drainage project.

Supreme Court of Louisiana

TERREBONNE PARISH POLICE JURY
Versus No. 81-C-0531

CARROLL MATHERNE

DIXON, Chief Justice, (dissenting)

I respectfully dissent.

I do not understand that there is any evidence in this record that Matherne's action renders the servitude of natural drain owed by any estate below Matherne's more burdensome.

Supreme Court
State of Louisiana

No. 81-C-0531

* * * * * * *

TERREBONNE PARISH POLICE JURY

VERSUS

CARROLL MATHERNE

* * * * * * *

APPLICATION FOR REHEARING
OF DEFENDANT-APPELLANT,
CARROL J. MATHERNE

ON WRIT OF REVIEW
TO THE COURT OF APPEAL, FIRST CIRCUIT

* * * * * * *

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Supreme Court
State of Louisiana

* * * * * * *

No. 81-C-0531

* * * * * * *

TERREBONNE PARISH POLICE JURY

Versus

CARROLL J. MATHERNE

* * * * * * *

APPLICATION FOR REHEARING

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA:

The Application for Rehearing filed by defendant-appellant, Carrol J. Matherne ("Applicant" and/or "Matherne"), in the above entitled and numbered cause, respectfully represents that:

1.

The opinion rendered by this Honorable Court on September 8, 1981, is based upon erroneous statements contradictory to the record herein.

2.

The object of this entire controversy is based upon a statement incorrectly reiterated throughout the opinion of this Honorable Court.

3.

The opinion states at page 2:

"Matherne had cut the ditches *only a few weeks before.*" (Emphasis added)

This statement is INCORRECT and contradictory to the record. The ditches had been in existence for FORTY YEARS. Matherne did NOT cut new ditches. (Tr. 71-76, 78, 81, 84, 253-255).

It is imperative to understand that Matherne is a person of minimum education. His testimony that he "cut" ditches *does NOT mean that he dug new ones.* Matherne used that expression when referring to his activities in *removing the spoil levee* placed by the police jury.

Matherne's continued use of the term "cut ditches" was expressly clarified during the trial. (Tr. 71-76, 78, 81, 253-255). However, the term was repeatedly used throughout the trial, and Applicant respectfully suggests that such lead to a misunderstanding by this Honorable Court of the facts of the case.

4.

The opinion also states at page 2:

"Since the flow from Matherne's *new* ditches appeared to contribute substantially to the prolonged flooding in the project area, the police jury *blocked the ditches on April 16 and 17.*" (Emphasis added)

This statement is INCORRECT. The police jury blocked the ditches when it widened "Canal C" and placed a spoil levee across *all* ditches on Matherne's land which had drained into Canal C for FORTY YEARS. (See, e.g., Tr. 72; 254-55).

5.

At page 1, the opinion states:

"An injunction *preventing a landowner from diverting* the natural drain of his property is not a taking or damaging of his property because he had no right to do anything to render the natural servitude of drain more burdensome upon the estates situated below." (Emphasis added)

The landowner NEVER attempted to divert the natural drain of his property. The ditches had naturally drained into Canal C for FORTY YEARS until the police jury place a spoil levee which BLOCKED the NATURAL drain.

6.

The opinion also states as follows:

a. "Matherne reopened one of the two ditches, *begin digging a third ditch,* and ordered parish employees from his property when they attempted to close them." (Emphasis added)

This statement is INCORRECT. Matherne did NOT dig ANY ditches. Matherne's "construction" merely involved removing the spoil levee placed by the police jury.

b. ". . . we conclude that Matherne's efforts to alter the natural drainage of his land exceed his lawful rights as owner of a dominate estate. *By cutting new ditches through the natural ridge* bordering Canal C Matherne diverted the drainage from most of his estate away from its natural flow, prevented it from reaching its natural destination and rendered more burdensome the servitudes due by the lower estates receiving Canal C's water by substantially increasing its volume." (Emphasis added)

This conclusion is based upon the ERRONEOUS finding that Matherne "cut new ditches through the natural ridge" of Canal C. The ridge was formed when the police jury constructed a spoil levee BLOCKING the natural destination (as it had existed for FORTY YEARS) of the drainage of Matherne's land.

C. "Matherne's unauthorized activity on his land caused a dramatically increased flow of water into the forced drainage system which significantly reduced the ability of the system to drain the watershed area quickly and efficiently."

This conclusion is ERRONEOUS. The natural drainage of Matherne's land had been blocked weeks by the spoil levee and after eleven (11) inches of rain, sought to remove the spoil blocking said natural drainage.

7.

The injunction issed by this Honorable Court is actually WITHOUT EFFECT based upon the facts of this litigation. The injunction reads as follows:

> "It is decreed that a preliminary injunction issue against Carroll J. Materne, prohibiting him, his agents, employees, and servants from unblocking the large drainage ditches blocked by the Terrebonne Parish Police Jury, from digging other such ditches in the future, and from diverting waters from his property into 'Canal C' a/k/a Bayou Tecon *which would not otherwise naturally flow into that canal.*" (Emphasis added)

Materne did NOT dig any new ditches and is NOT seeking to have this Honorable Court authorize such. Matherne did NOT divert waters from his property into Canal C which do not naturally flow into that canal and Matherne is *not* seeking to have this Honorable Court authorize such. Matherne seeks authorization for his property to drain IN THE MANNER IT ALWAYS HAD PRIOR TO THE TAKING WITHOUT COMPENSATION HEREIN.

8.

This controversy involves a violation of constitutional rights and guarantees of protection of private property. The injunction, as issued by this Honorable Court permanently restricts a landowner form removing spoil, of which he is the owner, and authorizes permanent interference with the drainage of private property as it has existed for approximately forty years.

Applicant respectfully urges this Honorable Court to grant this Application for Rehearing.

Respectfully submitted:
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Houma, LA 70360
(504) 872-9638

CAMP, CARMOUCHE, PALMER, BARSH, & HUNTER (A PROFESSIONAL LAW CORPORATION)

BY: /s/ A. J. Gray, III
A. J. Gray, III
Ninth floor, Louisiana Savings Building
P.O. Drawer 2001
Lake Charles LA 70602-2001
(318) 433-0355

CERTIFICATE

I certify that a copy of the foregoing Application for Rehearing of Defendant-Appellant, Carrol J. Matherne has been served upon plaintiff-appellee by mailing said copy to its counsel of record, Mr. Michael J. Samanie, 525 East Park Avenue, Houma LA 70360, United States mail, postage prepaid, properly addressed.

Lake Charles, Louisiana this _____ day of September, 1981

/s/ A. J. Gray, III

A. J. GRAY, III

Supreme Court
STATE OF LOUISIANA
New Orleans

September 30, 1981

Chief Justice Frank W. Summers (Retired)
102 Charity Street
P.O. Box 87
Abbeville, LA 70510

Re: Terrebonne Parish Police Jury
vs. Carroll Matherne, No. 81-C-0531

Dear Mr. Chief Justice:

This is to advise that the Court has granted you an extension of time up and through November 2, 1981 within which to file supplemental briefs in the above entitled matter. The same extension of time applies to the Respondents.

With kindest regards, I remain,

Very truly yours,

Frans J. LaBranche, Jr.
Clerk of Court

/s/ Dan B. Haggerty, Jr.
Dan B. Haggerty, Jr.
Deputy Clerk of Court

DBHJr: dt
ccs: Michael Samaine, Esq.
A. J. Gray, III, Esq.
H. Minor Pipes, Sr., Esq.

Supreme Court
State of Louisiana

* * * * * * *

No. 81-C-0531

* * * * * * *

TERREBONNE PARISH POLICE JURY

Versus

CARROLL MATHERNE

* * * * * * *

MOTION AND ORDER

NOW INTO COURT, through undersigned counsel, comes Carroll J. Matherne ("Matherne"), applicant for rehearing herein, and on suggesting to the Court as follows:

1.

On September 8, 1981, judgment was rendered herein by this Honorable Court in a decision authored by Justice Dennis from which the Chief Justice dissented and in which Justice Lemmon concurred by separate opinion.

2.

A timely appreciation for rehearing was filed herein by applicant Matherne. Upon motion on behalf of applicant Matherne, the Court granted additional time through November 2, 1981, to permit applicant Matherne to file a supplemental brief in support of Application for Rehearing. Attached hereto as exhibits are:

(a) Copy of letter dated September 16, 1981 from Frank W. Summers to Honorable Frans H. LaBranche, Jr. transmitting the original and eight copies of Motion and Order for Extension of Time to through November 2, 1981 and

Motion and Order to Enroll Additional Counsel of Record (Exhibit "A");

(b) Copy of Motion and Order for Extension of Time through November 2, 1981 (Exhibit "B");

(c) Copy of letter dated September 30, 1981 from Dan B. Haggerty, Jr. to Chief Justice Frank W. Summers (Retired) advising that "the Court has granted you an extension of time up and through November 2, 1981 within which to file supplemental briefs". The letter advised that the same extension of time applied to "Respondents", the Terrebonne Parish Police Jury. (Exhibit "C")

3.

It has come to the attention of counsel for Matherne that the Court may have prematurely acted upon Matherne's application for rehearing.

4.

This Honorable Court has inherent power to vacate or set aside any inadvertent or premature action.

WHEREFORE, applicant Matherne prays for such relief as is appropriate.

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BY: /s/ Frank W. Summers
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(318) 893-9798
Counsel for Mover

ORDER

Considering the foregoing motion, IT IS THEREFORE ORDERED that the denial of rehearing prematurely and inadvertently entered herein on October 9, 1981, be and the same is hereby set aside and vacated and that counsel for Matherne and Respondent have until November 2, 1981 in which to file supplemental briefs.

Thus done and signed this _____ day of _____, 1981, in New Orleans, Louisiana.

_____

CHIEF JUSTICE, JOHN A. DIXON, JR.

_____

ASSOCIATE JUSTICE,
PASCAL F. CALOGERO, JR.

_____

ASSOCIATE JUSTICE,
WALTER F. MARCUS, JR.

_____

ASSOCIATE JUSTICE,
FRED A BLANCHE, JR.

_____

ASSOCIATE JUSTICE,
JACK CROZIER WATSON

_____

ASSOCIATE JUSTICE,
HARRY T. LEMMON

CERTIFICATE

I certify that a copy of the foregoing Motion and Order has been served upon plaintiff by mailing said copy to its counsel of record, Mr. Michael J. Samanie, 525 East Park Avenue, Houma, Louisiana 70360, United States Mail, postage prepaid, properly addressed.

Abbeyville, Louisiana, this _____ day of October, 1981.

/s/ Frank W. Summers

FRANK W. SUMMERS

Opposition

Supreme Court, U.S.
FILED
APR 19 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1306

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARROLL MATHERNE
Petitioner,

versus

TERREBONNE PARISH POLICE JURY
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SUPREME COURT OF LOUISIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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JURISDICTION

Respondent objects to Petitioner's assertion of this Court's appellate jurisdiction over the actions of the Respondent in constructing Drainage Project 1-1A. As a review of the record will reveal this was not at issue in this proceeding and therefore not litigated. This Court's appellate jurisdiction is limited to that issue which was litigated and appealed—namely, whether the injunction at issue constitutes a "taking" and required compensation of Petitioner. For that purpose, this Court has jurisdiction pursuant to 28 U.S.C. § 1257 (3) and 28 U.S.C. § (c).

STATEMENT OF CASE

Respondent, Terrebonne Parish Police Jury (Jury), respectfully submits that the facts set forth by Petitioner, Carroll J. Matherne (Matherne), are inaccurate and incomplete. It is further submitted that the opinions of the Trial Court and Appellate Court would be of value to this Court in its determination of the facts and history of the case at bar. Accordingly, these judgments and opinions are included in the appendix, infra.

Matherne is attempting to re-try the case at bar by asserting "facts" which were not accepted by the Trial Court, Appellate Court or Supreme Court of Louisiana. Contrary to Matherne's assertions to this Court, the natural drainage of most of Matherne's

land is away from the closed drainage project.[1] Prior to these cuts, the evidence was uncontroverted and even supported by Matherne's witnesses that the natural flow of Matherne's land was south. Moreover, Matherne's own witnesses testified other canals were constructed on the land to drain it into the lower part of Bayou Cane (south of the Police Jury dam) which naturally flows into Little Bayou Black. In other words, Matherne's land was found by the lower Courts to traditionally drain *away* from Canal C. Matherne unlawfully diverted this drainage into Forced Drainage Project 1-1A to the detriment of the land owners in said project. It was this unlawful conduct and threatened conduct of this sort in the future which precipitated the injunctive relief at issue.

The facts and issues being argued to this Court at present by Matherne do not resemble the facts and issues determined at trial. Simply put, the Jury, pursuant to its responsibilities to the people of Terrebonne Parish, Louisiana, maintained closed Drainage Project 1-1A. In April of 1980, that system

---

1 Matherne emphasized at trial that he merely "cleaned out existing ditches". It is submitted that either Matherne's definition of cleaning a ditch is extremely broad or Matherne is attempting to mislead this Court. Pictures introduced into evidence show a man down in a "ditch" which was being "cleaned" by Matherne at the time by a dragline. The "ditch" was in fact a *canal* which was far deeper than the height of the man working in it.

failed to function for the first time since its inception. Investigation revealed that Matherne had opened the system to drain his land which in turn was draining swampland. The Jury closed the system by "plugging" only those holes made by Matherne. The system again functioned properly and the flood waters receded. The Jury sought injunction relief when Matherne threatened again to open the system and divert the natural drainage of his property into the system thereby increasing the area of the system beyond the capacity of the pumps which empty the system. The issue before this Court should be whether or not the injunction constitutes a "taking" which would require just compensation? The issues of "taking" and "compensation" which may have arisen because of the original *construction* of the drainage project have not been litigated as of yet.

It must also be pointed out that a large part of Matherne's eight (800) hundred acres constituted low land and *not* agricultural land. Matherne was attempting to drain this low land and develop it at the expense of the homeowners within the drainage project. Matherne's statement at pg. 21 of his brief that the actions of the Jury "will create drainage problems which will limit any economical viable use of his property" is false. The actions of the Jury and the injunction at issue have not *created* any drainage problems but merely fixed the drainage as it had always been

and maintained it as such. In effect what Matherne is arguing is that landowner A can legally and without repercussions drain his swamp into landowner B's land which has already been leveed, drained and improved. Such a proposition is obviously ridiculous.

ARGUMENT

The Louisiana Supreme Court correctly held that an injunction preventing a landowner from diverting the natural drain of his property is not a taking or damaging of his property because he has no right to do anything to render the natural servitude (easement) of drain more burdensome upon the estates situated below. The parish governing authority was entitled to have the landowner's unlawful acts enjoined in order to prevent substantial and irreparable injury to its drainage project. *Broussard v. Cormier*, 154 La. 877, 98 So. 403, (1923); *Petit Anse Coteau Drainage Dist. v. Iberia & V. R. Co.*, 124 La. 502, 50 So. 512, (1909); *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120, (1938); La. Civil Code Arts. 655 and 656. Even if such injunctive relief could be construed as a "taking", it would not be a "taking" which would require compensation of Matherne. *U. S. v. Sponenbarger* (1939) 60 S. Ct. 225, 308 U.S. 256, 84 L.Ed. 230.

In light of Matherne's threat under oath that he would repeat his past actions, it is submitted that in-

junctive relieves were proper in the case at bar. Not only was there an absence of contrition, but there was an affirmation of Matherne's intent to repeat his destructive and unlawful acts. *Securities and Exchange Commission v. Koracorp Industries, Inc.*, 575 F. 2d 692 (Cir. 1978), certiorari denied 99 S. Ct. 348, 439 U.S. 953, 58 L. Ed. 343.

CONCLUSION

Nothing was "taken" from Matherne because his construction of canals and diversion of drainage was unlawful in the first place. The only thing taken was his right to participate in unlawful activity. In light of his statements under oath that he would repeat this activity in the future, the only effective relief availabe to the Jury was injunctive.

Respectfully submitted,

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MICHAEL J. SAMANIE

Appendix

APPENDIX A

TERREBONNE PARISH POLICE JURY	32nd JUDICIAL DISTRICT COURT
VS. NO. 60,868	PARISH OF TERREONNE
CARROLL MATHERNE	STATE OF LOUISIANA

REASONS FOR JUDGMENT

The Terrebonne Parish Police Jury seeks a preliminary injunction prohibiting Carroll Matherne, his agents, employees and servants from interfering in any mannner with the repair, operation, maintenance and control of Forced Drainage Project 1-1A, particularly along what is known as Drainage "Canal C" a/k/a Bayou Tecon.

The Court finds the facts to be as follows:

The Terrebonne Parish Police Jury, as part of a parishwide drainage project, designed and constructed what is known as Forced Drainage District 1-1A. This particular drainage project, drains some 1,700 acres of residential area along the Bayou Terrebonne ridge. The intent of the project is to control

the water level in the residential areas containing in excess of 2,200 residents. The project is designed to be a "Closed System" in order to insure proper drainage through the use of dams, levees, natural ridges and pumps.

Within the project is a drainage canal known as "Canal C" a/k/a Bayou Tecon. This "Canal C" forms the southwestern boundary of the system. "Canal C" also forms the northern boundary of some 800 acres of property owned by Mr. Carroll J. Matherne.

"Canal C" has been in existence for many years, and has served as a drainage canal for several areas. "Canal C" drains in a westerly direction into another canal known as "Bayou Cane" which is an integral part of Project 1-1A. Along the southern bank of "Canal C", a ridge has been built up over the many years. The ridge in effect "Closes" the system within the project 1-1A on its southwestern boundary.

Sometime shortly before April, 1980, Mr. Matherne caused to be cut, two large ditches running in a northerly direction within his property. These ditches were large enough and deep enough to cut through the ridge on the northern boundary of his property into "Canal C". Shortly thereafter, on or about April 12 and 13, 1980, the entire area, included within Forced Drainage District Project 1-1A, as well as the

800 acre tract owned by Mr. Matherne, was inundated with approximately 11 inches of rain. This rainfall caused considerable flooding throughout areas lying near the western boundary of Forced Drainage Project 1-1A. Since Project 1-1A is under pump and the pumps ran continuously for three days without appreciable effect, representatives of the Terrebonne Parish Police Jury began to survey the canals and ditches within the Project 1-1A. It was during this examination of "Canal C" that the Jury discovered the two large cuts into the canal which were draining the Matherne property.

On April 16, 1980 the Jury closed the two cuts draining into "Canal C" which work was completed on April 17, 1980. Following the closing of the two cuts, it was noted that the standing water in the residential areas within Project 1-1A, began to subside as much as 12 inches in 12 hours.

Shortly thereafter, Mr. Matherne removed the earth
ened dams at at least one of the cuts and began a third cut to open into "Canal C". The Jury again sent men and equipment to close the cuts, but this time they were prevented from doing so by Mr. Matherne. Following this confrontation, the Terrebonne Parish Policy Jury sought and was granted a temporary

restraining order, prohibiting Mr. Matherne's interference. Under the protection of the temporary restraining order the Jury again returned to the site and blocked the large cuts leading into "Canal C".

After reviewing the evidence presented in the arguments of counsel, this Court is convinced that Mr. Matherne's actions in cutting large ditches, which open into "Canal C" did, in fact, impair the integrity and efficiency of Forced Drainage Project 1-1A. Mr. Matherne himself testified that unless he were to be restrained by Court order, he had every intention of draining his 800 acre tract of land into "Canal C" and therefore enter Forced Drainage Project 1-1A. It is obvious that the drainage system was intended and designed to be a closed system. Continued introduction of excessive amounts of water from a source outside the system destroys the efficiency of the system itself. Unless the system's integrity is maintained, irreparable injury will be suffered by the many residents lying within the project area. Mr. Matherne argues that the Terrebonne Parish Policy Jury has, by the construction of Forced Drainage Project 1-1A and by blocking the cuts which he made into "Canal C", altered the natural drainage of his property. It is further argued by Mr. Matherne that the Terrebonne Parish Police Jury is without authority or right to go upon his private property to block drainage work which he undertakes.

First, this Court is convinced that the natural drainage of Mr. Matherne's property is not as he claims, i.e., in a northerly direction into "Canal C". An aerial photograph "Defendant No. 3" clearly indicates the elevations as well as the existing ditching constructed over a number of years prior to Mr. Matherne's acquisition. This map was prepared by the Soil Conservation Service of the U. S. Department of Agriculture, and clearly shows a ridge running east and west across the tract which ridge lies just south of the bank of "Canal C". There are several small "split" ditches running north from the crest of the ridge, to the drainage "Canal C". This area drained in "Canal C" only includes approximately 120 acres. The bulk of the drainage for the rest of the tract is to the west, toward what is known as Little Bayou Black.

The small "split" ditches still drain into "Canal C" as they always have. The large cuts more recently dug by Mr. Matherne were obviously designed to carry for more water, than that contained between the crest of the ridge and "Canal C". Photographs of the cuts, while under construction indicate their depth to be in excess of the height of a man presumably of average build. Testimony of Mr. Matherne's own witnesses reveal that the cut or ditches Mr. Matherne claims he only "cleaned out", did, in fact, run south of the ridge toward a low swampy area in the center of the tract. The size of the cut was estimated by

employees for Terrebonne Parish Police Jury when the cuts were first discovered, as being deep enough to enter with an outboard motor and boat, or about 5½ feet deep.

Since there appears to be no issue as to the ownership of the southern bank of "Canal C" the Court finds, after a review of the Act of Sale introduced by defendant, and the description contained therein, that Mr. Matherne owns at the very least the southern bank of "Canal C". It therefore follows that the work done by the Terrebonne Parish Police Jury in blocking two or three cuts made by Mr. Matherne, into "Canal C", was conducted on the private property of Mr. Matherne.

It is argued by the Terrebonne Parish Police Jury, that its authority for such action, stems from La.R.S. 38:113 which provides as follows:

"The various levees in drainage districts shall have control over all *public drainage channels* within the limits of their districts and for a space of *100 feet* on each side of the channel, selected by the district and recommended and approved by the Department of Public Works, whether the drainage channels have been improved by the levee or drainage district, or have been adopted by without the improvement as necessary parts of or extension to improve drainage

channels, and may adopt rules and regulations for preserving the efficiency of the drainage channels."

This court finds that La. R.S. 38:113 does, in fact convey the authority to the Jury to take such action as was taken and to seek injunctive relief to maintain the integrity of the system. The Terrebonne Parish Police Jury did, in fact, create a parishwide drainage district. The record indicates that the plans and specifications were approved by the Department of Public Works in the particular instance of Forced Drainage Project 1-1A. The Jury included into the system "Canal C" which had traditionally been a public drainage canal for many years. "Mr. Matherne contends that only his ancestorian title used the canal. However, maps of the area show other areas draining into the canal as well". There was testimony both by representatives of the Jury as well as Mr. Matherne himself, that the Jury did widen "Canal C" at some point in the construction of the project. Even if this not be considered an improvement, the Jury, by including the canal into its system, brings it under the provisions of the statute.

This then grants unto the Terrebonne Parish Police Jury the servitude, although limited, of 100 feet on either side of channel of "Canal C". The limited purpose of such servitude is to maintain the efficiency of the drainage channel.

The Court finds that Mr. Matherne's actions in cutting the two or three large ditches into "Canal C", introduced a large quantity of water from an area almost one-half the size covered under Forced Drainage Project 1-1A. This, in effect, increased the already burdened system by nearly 50% and caused the total destruction of the efficiency of the drainage "Canal C", as well as the entire system. Inefficient performance can be caused as much by oversupply as by an undersupply of anything.

In this Court's opinion, the emergency situation created by the elements and aggravated by an act of man, is exactly what was contemplated by the statute and the limited rights granted thereunder.

It cannot be said Mr. Matherne was unaware of the situation which he created. He testified that he was personally told by an authorized representative of the Terrebonne Parish Police Jury that his actions were creating a prolonged flooding situation in many of the residential areas within Project 1-1A. This, coupled with the fact that he found the cuts closed, re-opened them, then refused employees of the Terrebonne Parish Police Jury to reclose the cuts until he was judicially restrained, demonstrates the willful disregard for the mandate of the local governing body that he refrained from such further activity.

The Court therefore finds the actions of the Terrebonne Parish Police Jury to be authorized by La. R.S. 38:113 and in keeping with its duty to protect the integrity of the drainage project and the citizens residing therein. In light of the declaration by Mr. Matherne, that unless enjoined, he will persist in his undertaking, the Court has no choice but to issue the preliminary injunction as prayed for.

These reasons for judgment rendered and signed in Chambers in Houma, Louisiana, this 19th day of May, 1980.

/S/ illegible

DISTRICT JUDGE

Filed
May 20, 1980

APPENDIX B

TERREBONNE PARISH POLICE JURY — STATE OF LOUISIANA

VERSUS — COURT OF APPEAL

FIRST CIRCUIT

CARROLL MATHERNE — NUMBER 13,889

APPEAL FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT, PARISH OF TERREBONNE, STATE OF LOUISIANA, HONORABLE PAUL R. WIMBISH, JUDGE PRESIDING.

BEFORE: COVINGTON, CHIASSON AND LEAR, JJ.

CHIASSON, J.

Defendant-appellant, Carroll Matherne, appeals the judgment of the trial court enjoining him from interfering in any way with the Forced Drainage Project No. 1-1A constructed and maintained by the plaintiff-appellee, Terrebonne Parish Police Jury, in the Parish of Terrebonne.

Carroll Matherne owns an 800 acre tract of land in Terrebonne Parish which is bordered by Bayou Cane to the West, Little Bayou Black to the South and Hollywood Road on the east. The northern boundary consists of a drainage canal referred to as "Canal C" which is the center of dispute in this matter.

Terrebonne Parish Policy Jury devised a forced drainage system in the Parish known as the Forced Drainage Project No. 1-1A to control serious flooding in several residential areas. The waterways that were included in this project are the two previously mentioned bayous and the controversial "Canal C." The system was not intended to include Matherne's property, which is composed mostly of farmland.

After completion of the project in December of 1979, heavy rains pounded the Parish with eleven inches of rain falling within a 31 hour period in April of 1980. Extensive flooding occurred in the Control Drainage Project area. The system did not control the flooding as expected, so the Police Jury instituted an investigation to determine the cause of its failure.

Three of the Jury's employees, S.P. Brunet, Richard Baptiste, and John Swilley, testified that the failure of the system was caused by the flow of water from Matherne's property into Canal C. Several large drainage ditches had been opened by Matherne to

allow more of his property to drain into Canal C. The Police Jury proceeded to "plug" these openings which caused the flooding to recede within the next 12 hours.

Matherne proceeded to reopen one of the openings and began what he termed "cleaning out" another ditch. The result was an additional enlarged drainage canal flowing into Canal C. As one employee described the opening, it was large enough to propel a motorboat through it.

The Police Jury again attempted to close the opening but Matherne ordered them off his property. After this action, the Police Jury obtained a Temporary Restraining Order restricting Matherne from taking any additional action until a hearing could be set on the matter for a preliminary injunction.

After a full hearing with the introduction of numerous aerial maps and many expert witnesses, the trial court for written reasons assigned granted the preliminary injunction. In its reasons, the court recognized the authority of the Police Jury to control and maintain Canal C under La.R.S. 38:113. In addition, the court concluded that injunctive relief was a proper remedy available to the Police Jury. It is from this ruling that the appellant, Matherne, perfected this appeal.

We will limit our discussion to the correctness of the trial court's decision on the injunction. Other remedies available to the parties are not before this court at this time and will not be passed upon.

Applicable to the determination of this matter is La.R.S. 38:113, which reads as follows:

> "The various levee and drainage districts shall have control over all public drainage channels within the limits of their districts and for a space of one hundred feet on each side of the channel, selected by the district and recommended and approved by the Department of Public Works, whether the drainage channels have been improved by the levee or drainage district, or have been adopted without improvement as necessary parts of or extensions to improved drainage channels, and may adopt rules and regulations *for preserving the efficiency of the drainage channels.*"

Certain prerequisites are essential before such a governmental body as the Police Jury may take advantage of the provisions of this statute. First of all,

the Police Jury must qualify as a levee and drainage district. Secondly, the canal it wants control over must be a public drainage channel within the limits of the governing body's district. Thirdly, the channel must be selected by the district and recommended and approved by the Department of Public Works. Lastly, this channel must have been improved by the governing body or must have been adopted without improvement as a necessary part or extension to improved drainage channels.

The Terrebonne Parish Police Jury is the proper party to bring this action. Under the law and the jurisprudence, the Police Jury which has control and maintains all public drainage channels is considered the appropriate governmental body to bring this action. La.R.S. 38:141. *Dugas v. St. Martin Parish Police Jury*, 351 So.2d 271 (La.App. 3rd Cir. 1977); *Plaquemines Parish Com'n v. Hero Lands Co.*, 388 So.2d 790 (La. 1980).

The second prerequisite is the crucial requirement in this case. "Canal C" must be considered a public drainage channel located within the district for the Police Jury to have control over it. The *Dugas* case, supra, at page 273 discusses this concept by citing with approval the written reasons of the trial court:

" 'Let's look now to a definition of public drainage channel to see if the drainage ditch in this case, which was always referred to as the 'Dugas Ditch', comes within the meaning of the public drainage channel. I find no explicit definition in the law of this State of a public drainage channel. The conclusion I've reached, I've gleaned from several sources. One is Section 215 of Title 38, which defines drainage as any natural drain or artificial drain which has been used for purposes of drainage for at least ten years. In the case of Scott versus Red River-Bayou *Pierre Levee and Drainage District of Louisiana,* a 2nd Circuit decision, reported in (La.App.) 7 So.2d 429, the court said that for purposes of Act 61 of 1904, which is, as I said, R.S. 38:113, that for those purposes it's immaterial whether it's a natural drain or an artificial drain as long as it's maintained for many years as a drainage ditch. That's how that court defined a public drainage channel within the meaning of Section 113. In the *Petit Anse Case* which I

> referred to earlier, the Louisiana Supreme Court in considering Act 61 of 1904, defines public drainage by distinguishing public drainage from drainage affecting only the interests of particular individuals. The converse of that is that public drainage is drainage affecting the interests of other than particular individuals; that is, individuals in general and the public. (Tr., pg. 146-147).' "
> (Footnote Omitted).

In his brief, defendant-appellant in a footnote states that he makes no issue over whether Canal C is "public" or "private." Aside from this statement, we agree that Canal C is a public drainage channel as found by the trial court in its reasons for judgment. Mr. S.P. Brunet, herbicide spray foreman for the Police Jury, testified that he maintained Canal C for four and one half years, making monthly inspections of the canal. Two other witnesses testified that the canal was cleaned and widened by the Police Jury during the construction of the Project 1-1A. In addition, aerial maps introduced into evidence reflect that other areas drain into the canal even though it may only have been built by Matherne's ancestors in title for their farming purposes.

The third prerequisites is that the Channel was selected by the Police Jury and approved by the Department of Public Works. The construction plan maps were introduced into evidence and reflect that the disputed Canal C was selected by the Police Jury and was accepted as part of Project 1-1A by the Department of Public Works. We again agree with the trial court's factual conclusions on this point.

The remaining requirement is that the channel is a necessary part or extension to improve drainage channels. There is no serious dispute that the cleaning and control of Canal C is an integral part of the Forced Drainage Project 1-1A which is designed to improve the drainage channels in the immediate area.

With these prerequisites met, the Police Jury has acquired a limited servitude to control and maintain Canal C as a drainage channel. It has not claimed ownership of either the canal or land adjacent to it nor has it acquired such. See *Dugas*, supra, and *Scott v. Red River-Bayou Pierre Levee & D. Dist.*, 7So.2d 429 (La.App. 2nd Cir. 1942). If the Police Jury has taken or damaged the adjacent landowner's property, there are available remedies for the landowners, but not in this summary proceeding.

Since the Police Jury enjoys the limited servitude which extends "for a space of one hundred feet on each side of the channel" it may take any appropriate measures solely for the "preservation of the efficiency of such drainage channel(s)." La.R.S. 38:113.

In this particular case, the appropriate measure was seeking to enjoin Matherne from interfering with the efficiency of drainage of Canal C. The record is full of testimony that the actions of Matherne in "cleaning out" his ditches had an adverse effect on the drainage in Canal C and in the Forced Drainage Project as a whole.

In granting the Preliminary Injunction, the trial judge stated:

> "After reviewing the evidence presented in (sic) the arguments of counsel, this Court is convinced that Mr. Matherne's actions in cutting large ditches, which open into 'Canal C' did, in fact, impair the integrity and efficiency of Forced Drainage Project 1-1A. Mr. Matherne himself testified that unless he were to be restrained by Court order, he had every intention of draining his 800

> acre tract of land into 'Canal C' and therefore enter Forced Drainage Project 1-1A. It is obvious that the drainage system was intended and designed to be a closed system. Continued introduction of excessive amounts of water from a source outside the system destroys the efficiency of the system itself. Unless the system's integrity is maintained, irreparable injury will be suffered by the many residents lying within the project area.* * *"

We agree with this conclusion and affirm the issuance of the Preliminary Injunction based on this showing of irreparable harm.

For these reasons, the judgment of the trial court is affirmed at appellant's costs.

AFFIRMED.